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QUESTIONS PRESENTED

1. Whether the Second Circuit's holding that a school district may limit the use of its facilities to secular purposes is correct in light of the strong public policy considerations inherent in such a designation?

2. Whether the concept of a "limited public forum," in which the standard by which the exclusion of speakers differs according to the speaker and the speaker's purpose, is consistent with this Court's public forum analysis?

3. Whether the policy of New York State and Center Moriches in excluding religious, political and commercial speech is constitutionally reasonable and viewpoint-neutral?

4. Whether the unlimited access policy petitioners seek would give rise to the impermissible inference that government is endorsing and supporting religion in violation of the First Amendment's Establishment Clause?

5. Whether Center Moriches' present selective access policy demonstrates hostility toward religion in violation of the Establishment Clause?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

A. Statement of Facts 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THE EXCLUSION OF A RELIGIOUS ORGANIZATION FROM SCHOOL DISTRICT FACILITIES WAS PROPER IN ALL RESPECTS AS THE FORUM WAS LIMITED TO SECULAR USES AND THE LIMITATION WAS CONSTITUTIONALLY REASONABLE AND VIEWPOINT-NEUTRAL 7

A. The "Limited Public Forum" Is A Legitimate And Beneficial Category Of Fora And Its Use Is Well Supported And Well Advised Both By Public Policy And By This Court's Application Of Public Forum Doctrine 10

1. Public Policy Strongly Favors The Use Of The "Limited Public Forum" Category 11

2. The "Limited Public Forum" Category Is Presently Used By This Court As Part Of Its Public Forum Analysis 13

B. Constitutional Standard of Review 16

C. The Center Moriches School District Facilities Are Limited Public Fora 17

1. New York State And Center Moriches District Policy Supports The Conclusion That The School Facilities Are Limited Public Fora 19

2. Past Practice Of The Center Moriches School District Similarly Supports The Conclusion That The School Facilities Are Limited Pubic Fora 22

D. As Center Moriches School District Is A "Limited Public Forum," The Exclusion Of Lamb's Chapel, A Non-Eligible Speaker, Need Only Be Reasonable And Viewpoint-Neutral To Pass Constitutional Muster 23

1. Reasonableness 23

2. Viewpoint-neutral 25

II. A COURT ORDERED POLICY OF UNLIMITED ACCESS WILL VIOLATE THE FIRST AMENDMENT'S PROHIBITION AGAINST GOVERNMENT ESTABLISHMENT OF RELIGION 27

A. Access To Public School Facilities By Religious Organizations May Result In The Appearance Of Government Imprimatur Of Religion 28

B. The Primary Effect Of A Court-Ordered Unlimited Access Policy Would Be Government Advancement And Financial Support Of Religion 29

III. CENTER MORICHES' EXCLUSION OF RELIGIOUS SPEECH FROM PUBLIC SCHOOL FACILITIES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE 31

CONCLUSION 33

TABLE OF AUTHORITIES

PAGE

Cases:

Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788 ..... 5, *passim*

Deeper Life Christian Fellowship, Inc. v. Board of Educ., 852 F.2d 676 (2nd Cir., 1988) 17,18

Hunt v. McNair, 413 U.S. 734 (1973) 30

International Soc'y for Krishna Consciousness v. Lee, 112 S.Ct. 2701 (1992) 9

Lamb's Chapel v. Center Moriches Union Free School Dist., 959 F.2d 381 (2nd Cir., 1992) .. 10,18,19

Leman v. Kurtzman, 403 U.S. 602 (1971) ..... 6, *passim*

Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) 9

Terry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) ..... 5, *passim*

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 9,15

Travis v. Owego-Appalachian School Dist., 927 F.2d 688 (2nd Cir., 1991) 10

Trietley v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't., 1978) 17,30,31

U.S. v. Kokinda, 110 S.Ct. 3115 (1990) 14,15

Walz v. Tax Commission, 397 U.S. 664 (1970) 27

Widmar v. Vincent, 454 U.S. 263 (1981) . . . . . 9, *passim*

Constitution, statues and rules:

U.S. Const., Amend. I . . . . . 6, *passim*

42 U.S.C. §1983 1

N.Y. Educ. Law §414(1)(a)-(j) (McKinney 1988 and Supp. 1992) . . . . . 2, *passim*

Center Moriches Rules and Regulations for Community Use of School Facilities . . . . . 2, *passim*

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 91-2024

LAMB'S CHAPEL and JOHN STEIGERWALD,
Petitioners,

v.

CENTER MORICHES UNION FREE SCHOOL DISTRICT, LOUISE TRAMONTANO in her official capacity as President of The Board of Education for Center Moriches Schools, and NEW YORK STATE ATTORNEY GENERAL'S OFFICE,
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

This case arises from respondent's denial of petitioner's application to use a school auditorium for the purpose of showing a film proselytizing the Christian approach to family values. The decision to exclude petitioner was due to the admittedly religious nature of the film and the School District's prohibition against the use of school property for religious purposes.

Petitioner seeks injunctive and declaratory relief, pursuant to 42 U.S.C. §1983, against the School District for denying them the right to use public school facilities.

A. Statement of Facts

Petitioners in the present case are Lamb's Chapel, an Evangelical Christian Church, and John Steigerwald, pastor of Lamb's Chapel. Respondent's are Center Moriches Union Free School District, Louise Tramontano, in her official capacity as President of the Center Moriches Board of Education, (hereinafter collectively referred to as "Cen Moriches" or "School District") and the New York S Attorney General's office.

Petitioner John Steigerwald, on behalf of Lamb's Chapel, wrote to Mrs. Alice M. Schoener, business manager and district clerk of Center Moriches (Tr. 60), on November 21, 1988, identifying himself as pastor of a growing Christian congregation and stating that "[o]ur paramount objective is to share the love of Christ" (J.A. 70). Enclosed with that letter was an application seeking

permission to use the school facilities for Sunday morning church services and Sunday school (J.A. 73). By letter dated November 23, 1988 (J.A. 78), Mrs. Schoener denied Lamb's Chapel's request citing Rule #7 of the Center Moriches "Rules and Regulations For Community Use of School Facilities." (J.A. 74-77) (hereinafter "Rules and Regs"). Rule #7 mandates that "[t]he school premises shall not be used by any group for religious purposes" (J.A. 75).

Petitioner John Steigerwald twice renewed his application to Center Moriches, each time seeking access to the school's facilities once a week for a period of five weeks (J.A. 80, 91). The purpose of each of these requests was to present a film series entitled "Turn Your Heart Toward Home." By Reverend Steigerwald's admission, this film series stressing family values was "from a Christian perspective" (J.A. 91). Each of these applications were denied by Mrs. Schoener due to the decidedly religious perspective of the film (J.A. 84, 92).

Mrs. Schoener further advised Mr. Steigerwald that the School Board of Education's position was governed by New York State Education Law, section 414 (J.A. 78), which enumerates the ten purposes for which public school property may properly be used. Religious use is not among the ten. N.Y. Educ. Law §414 (1)(a)-(j) (McKinney 1988 and Supp. 1992). However, religious use is not the only exclusion. The statute also proscribes use of public school facilities for partisan political rallies and commercial enterprises.

Pursuant to section 414 and the Center Moriches "Rules and Regs", the school district had permitted a

number of different organizations to use school facilities for various purposes. Petitioners in their brief to this Court have listed the groups that have been granted access as well as the activities and topics that have been discussed (Pet. Br. at 4-6). Nowhere in the petitioners' exhaustive listing is there mention of a religious group who gained access to the school facilities for religious purposes. In fact, the School District has never granted access to any organization that sought to use the facilities for the proselytization of religion.

On the contrary, the Center Moriches public school facilities have been used, consistently with section 414 and the Rules and Regs, only for social, civic, recreational and educational purposes.

SUMMARY OF ARGUMENT

Respondent Center Moriches School District denied petitioners' application to use public school facilities on the grounds that Lamb's Chapel sought access to the school facility to proselytize their religious views. This exclusion was mandated by the Center Moriches Rules and Regs which prohibit use of school facilities for religious purposes. The School District's enactment of the Rules and Regs was governed by New York State Education Law §414(1)(a)-(j) which enumerates the purposes for which public school property may properly be used. Both the statute and the Rules and Regs also prohibit use of public school facilities for political and commercial purposes.

The question thus becomes whether the exclusion of Lamb's Chapel violated any provision of the U.S. Constitution. Respondents argue that it is indeed constitutional to exclude a religious entity from a forum opened for the limited purpose of social, civic, recreational or educational use.

The statute and regulation, in rationally limiting access to public school facilities, are firmly supported by sound public policy. It is eminently reasonable to expect problems to arise if a particular religious or political group is granted access to a public school building. If governmental bodies are not free to open their facilities on a limited basis, i.e. - for a selected class of speakers or for discussion of selected subjects, then these forums may not be opened at all. School Districts, municipalities or States may decide that rather than become embroiled in controversy every time a radical

religious or political organization seeks access to its facilities, that the function of the facility in question may be best served by a closed door policy. Such problems clearly would not be limited to radical religious groups. Given the wide range of existing religious beliefs and that certain beliefs are inherently offensive to others, sometimes violently so, it is sensible to anticipate that a certain group's use of facilities in a particular religious/ethnic community would give rise to a volatile and destructive situation. A policy resulting in closed doors would benefit no one and communities across the nation will suffer as a result. The statute and regulation in issue forestall such results.

A "limited public forum" is created when a government body opens a particular forum for certain uses while excluding others. Such a category of fora comports with this Court's previous public forum analysis, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), and is further supported by a strong public policy argument. This Court has held that "a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly or speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense & Ed. Fund.*, 473 U.S. 788, 802 (1985). Regulations excluding a member of a class for whom the forum was opened are judged by the strict scrutiny test applicable to traditional public forums, while exclusion of unspecified users or uses is governed by the non-public forum reasonableness standard.

Based on this "limited public forum" analysis, Lamb's Chapel is not a member of the class for whom this forum was open and is therefore a non-eligible speaker. As such, the exclusion of Lamb's Chapel must be judged on the reasonableness/viewpoint-neutral test and that standard is satisfied here. The exclusionary regulation is reasonable as it furthers the government's interest in maintaining the proper functioning of the facility at issue. Moreover, the regulation is viewpoint-neutral as it prohibits all religious or anti-religious speech on equal grounds.

The unlimited access policy petitioners argue for would violate the First Amendment's prohibition against state establishment of religion. Such a policy would have the primary effect of providing financial aid to religious institutions and it would unnecessarily entangle government with religion. *See, Lemon v. Kurtzman*, 403 U.S. 602 (1971). It may also give rise to the impermissible inference that government is endorsing a particular religious faith.

Moreover, contrary to petitioner's assertions the statute and regulation in issue here do not offend the Establishment Clause. The statute and regulations at issue do not demonstrate hostility toward religion. The petitioners herein remain entirely free to engage in their religious activities and beliefs. They merely are required to use the wide range of facilities, other than the public schools, available to them to do so.

ARGUMENT

It is respectfully submitted that this case requires careful consideration of public policy in light of the various interests that are at stake. Petitioners argue that their rights of free speech are being abridged. However, it must be remembered that the reasonable limitations utilized by respondents are only being applied in a very limited forum and with good reason. This forum has been opened specifically for the Center Moriches School District community's social, civic, recreational and educational enjoyment. A court-ordered unlimited access policy, while benefitting petitioners, may have the adverse effect of stifling the community's ability to enjoy the use of the school facilities for social, etc. purposes. The School District, in response to court-ordered access, may conclude that the burden it will suffer in maintaining a forum open to such diverse use substantially outweighs the benefit inherent in an unlimited open forum; and may decide to close this forum altogether. No person or interest benefits from such a policy.

I. THE EXCLUSION OF A RELIGIOUS ORGANIZATION FROM SCHOOL DISTRICT FACILITIES WAS PROPER IN ALL RESPECTS AS THE FORUM WAS LIMITED TO SECULAR USES AND THE LIMITATION WAS CONSTITUTIONALLY REASONABLE AND VIEWPOINT-NEUTRAL.

In an attempt to establish a workable standard by which to measure when and how the government may regulate speech protected by the First Amendment, this

Court has found it useful to first determine the nature of the government facilities in which private speakers seek to publicize their views. This "forum analysis" approach to First Amendment issues identifies the nature of the government property sought to be used, the interest of the government in that property, and the standard that must be applied in determining whether a particular speaker has been properly excluded from that forum. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)("the extent to which the Government can control access [to a particular forum] depends on the nature of the relevant forum").

Pursuant to this "forum analysis" approach, this Court has traditionally divided government property into three classifications: the traditional public forum, the designated public forum and the non-public forum. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45-46 (1983). The government property in which the public's access is greatest and the government's control is slightest is the traditional public forum: "places which by long tradition or government fiat have been devoted to assembly and debate," *Id.* at 45. Classic examples of such fora are public streets and parks. Government's ability to control expressive activity is most restricted in these traditional open fora, *Id.*, with the standard being one of strict scrutiny. This standard requires the state to demonstrate that an exclusionary regulation is based upon a compelling state interest and that the regulation is narrowly drawn to further that interest. *Id.* Failure to meet this arduous standard results in the government being forced to grant access to the excluded party.

Similar in nature to the traditional public forum is the designated public forum. Government property which has not traditionally been open to public assembly and debate but which the government has opened for use by the public, either for limited or unlimited purposes, falls into this second category. *International Soc'y for Krishna Consciousness v. Lee*, 112 S.Ct. 2701, 2705 (1992). While the state is not required to open such a forum nor keep it open indefinitely, "as long as it does so it is bound by the same standards as apply in a traditional public forum." *Perry*, 460 U.S. at 46. This Court has found such government facilities as public universities, *Widmar v. Vincent*, 454 U.S. 263 (1981), municipal theaters, *Southeastern Promotion's, Ltd. v. Conrad*, 420 U.S. 546 (1975), and public school board meetings, *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n.*, 429 U.S. 167 (1976) to be designated public fora.

The third and most restricted category consists of "public property which is not by tradition or designation a forum for public communication." *Perry*, 460 U.S. at 46. In these non-public fora, the government need only demonstrate that its regulation restricting access is reasonable in light of the facility's intended purposes and is "not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* The government policy need not be the most reasonable nor the only reasonable limitation in order to pass constitutional muster. *Cornelius*, 473 U.S. at 808.

While the three categories discussed above have traditionally encompassed the entire realm of possible public fora, it now appears that a fourth category has

been - and with good reason should be - utilized as part of this Court's forum analysis: "the limited public forum." A limited public forum is defined as a subcategory of designated public forum in which the government has opened a particular property for use by a certain class of speakers or for assembly and debate on selected subjects. *Perry*, 460 U.S. at 46, n. 7 ("[a] public forum may be created for a limited purpose such as use by certain groups, ... or for discussion of certain subjects ...."); *Travis v. Owego-Appalachian School Dist.*, 927 F.2d 688, 692 (2nd Cir., 1991)(a limited public forum "is created when government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects"). Under this "limited public forum" concept, government property remains a non-public forum as to all unspecified uses. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381, 386 (2nd Cir., 1992).

A. The "Limited Public Forum" Is A Legitimate And Beneficial Category Of Fora And Its Use Is Well Supported And Well Advised Both By Public Policy And By This Court's Application Of Public Forum Doctrine.

Petitioners allege in their brief to this Court that the Center Moriches School District facilities are designated public fora, Pet. Br. at 18, and further argue that the "Second Circuit's approval of a 'religion-free' designated public forum represents an unconstitutional distortion of public forum doctrine." Id. at 22. The petitioners are mistaken. The limited public forum simply maintains a distinction already in use by this Court and its use is further supported by a strong public policy argument.

1. Public Policy Strongly Favors The Use Of The "Limited Public Forum" Category.

The Center Moriches School District, as well as the other school districts in New York (and many throughout the nation), has opened its doors for use by the community for "social, civic, and recreational" purposes. It has done so fully aware of the benefit thereby tendered to the district's populace. Moreover, it has done so willingly and voluntarily, eager to return the support of its constituents.

However, the State Legislature has determined that an open access policy would work best by being limited to "social, civic, and, recreational" use. The Legislature has done this neither to inhibit the free exercise of religion nor stifle vigorous political debate. Rather, the legislature has simply provided the district's inhabitants with ample facilities in which to gather for nonprofit, apolitical and secular meetings and entertainment.

As this Court has recognized in the past, the School District was not required to open its facilities in this way, nor are they required to keep them open indefinitely. *Perry*, 460 U.S. at 46; *Cornelius*, 473 U.S. at 802. With this in mind, respondents respectfully urge this Court to consider the consequences of a decision in petitioner's favor. The Center Moriches School District (as well as every other school district in New York and the Nation that had provided access to their facilities to any portion of the community) would now be required to open their doors to all speech, regardless of purpose and intent. This would necessarily require the granting

of applications to the Neo-Nazi party and the Ku Klux Klan. Partisan political rallies and flea markets (as applications from commercial groups would similarly have to be granted) would become commonplace in the public schools of this Country.

Petitioners would necessarily argue that this is precisely what is required and protected by the First Amendment; for there is no logical basis to argue that religious speech should be allowed while political speech may be excluded. Thus, we have a situation where if the school districts of this Country desire to open their facilities for use by the community then they must open their doors to all speech.

Given the wide range of existing religious beliefs and that certain beliefs are inherently offensive to others, sometimes violently so, it is sensible to anticipate that certain groups' use of facilities in a particular religious/ethnic community would give rise to a volatile and destructive situation.

Imagine the problems associated with a request from a militant Muslim organization in a predominantly Jewish neighborhood. Demonstrations, perhaps violent demonstrations, may become commonplace and would not necessarily be confined to non-school hours. Such occurrences may have the disastrous effects of destroying school property, disrupting classes when in session and subjecting the students to potentially violent demonstrations.

Given these possibilities, respondents believe that an unlimited access policy is not required of the First

Amendment. In fact, a decision in petitioners favor may have the effect of stifling speech rather than protecting and encouraging it. The Center Moriches School District may well decide (and any or all of the other state school district may follow suit) to close their doors to all and confine the use of the school facilities to its intended educational purpose. The School District (or the New York Legislature for that matter) may decide that rather than become embroiled in controversy every time a religious sect or radical political organization seeks access to its facilities and rather than expose the district's youths to potentially harmful demonstrations, a better course may be to adopt a closed door policy and leave the community to provide for their "social, civic, and recreational" enjoyment on their own. No one benefits from such a policy, and the ability of the community to gather for assembly and discussion may be severely curtailed.

2. The "Limited Public Forum" Category Is Presently Used By This Court As Part Of Its Public Forum Analysis.

Public policy notwithstanding, the distinction inherent in the "limited public forum" category is already an integral part of public forum analysis. This Court has, on numerous occasions, spoken of a particular type of designated public fora in which a government facility has been opened for use by a selective class of speakers or for speech on designated subjects.

In *Perry*, *supra*, for example, it was held that a school's internal mail system was a non-public forum open for use to only a limited number of outside entities. *Id.* at 47. This Court, in so holding, stated:

> [t]here is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. *This type of selective access does not transform government property into a public forum.*

Id. (emphasis added).

Similarly, in *U.S. v. Kokinda*, 110 S.Ct. 3115 (1990), this Court held that a sidewalk on postal service property was a non-public forum even though some expressive activity had been permitted there. The Court, citing *Perry* and *Cornelius*, *supra*, stated:

> [w]e have held that '[t[he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a non-traditional forum for public discourse.'
>
> . . . .
>
> Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum, under

> *Perry*, regulation of the reserved non-public uses would still require application of the reasonableness test.

Kokina, 110 S.Ct. at 3121; *see also*, *Cornelius*, 473 U.S. 788, 805 (Combined Federal Campaign is a non-public forum providing limited access only to "those organizations considered appropriate"); *Widmar*, 454 U.S. 263 (university facilities available limited only to student groups); *Southeastern Promotions*, 420 U.S. 546 (municipal facilities limited to dramatic productions).

In the cases cited above, this Court found the facilities at issue to be non-public fora with respect to all groups or organizations dissimilar in purpose to those meeting the limiting criteria. As to organizations of a character or purpose similar to the permitted groups, those facilities were designated public fora.

Respondents are asking this Court in the present case to maintain this distinction. The School District believes, as the Second Circuit has held, that it would be advisable for this Court to now categorize this distinction by designating such fora as "limited public fora," rather than "designated public fora" for entities of a similar nature and "non-public fora" as to organizations different in character. The respondent School District believes such an approach would aid this Court in clarifying what some believe is confusion regarding public forum analysis. *See* ACLU brief at 18-21 ("[i]n our view, the conceptual framework of *Perry* suffers from a central inconsistency that the facts of this case have clearly exposed"). Moreover, there is a strong public policy argument (*see*, *supra*, Section I.A.1.) in favor of

maintaining (or creating) this fourth category of public fora.

B. Constitutional Standard of Review

However, whether the limited public fora categorization respondent advances or the current designated public fora/non-public fora distinction is maintained, the standard by which excluded speech or speakers is judged is still the same. The exclusion of eligible speakers (i.e - those with a purpose or character similar in nature to those traditionally granted access to a particular forum) from a given government facility would still be judged by the "traditional public forum" strict scrutiny test. Conversely, the reasonableness/viewpoint-neutral test would be applied to the exclusion of non-eligible speakers (i.e. - those with a mission dissimilar to a facility's specified uses).

Thus, in the *Widmar* case, *supra*, it was found that the University of Missouri at Kansas City (UMKC) had granted access to their facilities and had officially recognized over 100 different student groups and in fact encouraged the activities of student organizations. This Court applied the "traditional public forum" strict scrutiny test in determining that the exclusion of an eligible speaker - a student religious group - was unconstitutional. The Court, in so holding, stated that the UMKC had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion." *Widmar*, 454 U.S. at 269. The forum at issue in *Widmar* was the University campus and was a "generally open forum" only with respect to organizations

of similar character. If, however, it was a church organization unaffiliated with the UMKC that had sought access, the standard applied to the University regulation restricting access would have been one of reasonableness. *Id*. at 267-68, n. 5.

The respondent School District respectfully submits - as petitioners and *amici* have argued - that the *Widmar* decision is indeed controlling here, albeit with a different result. As the following analysis will clearly demonstrate, Lamb's Chapel is not an eligible speaker, as the student group was in *Widmar*, and the School District regulation excluding Lamb's Chapel was reasonable and viewpoint-neutral. As such, the Second Circuit's decision holding the exclusion of Lamb's Chapel to be necessary and proper was eminently correct and should be affirmed by this Court.

C. The Center Moriches School District Facilities Are Limited Public Fora.

Respondent's argument here is based upon the premise - and petitioners do not dispute this point - that public school facilities are not traditional public fora. *Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2nd Cir., 1988); *Trietley v. Board of Educ.*, 65 A.D. 1, 8, 409 N.Y.S.2d 912, 917 (4th Dep't., 1978). Rather, school district facilities are non-public fora that may, at the school district's discretion, and in accordance with New York Education Law section 414, be opened for limited public discourse. If and when they are so opened, they become designated public fora. This, however, holds true only for those entities that are similar in character and purpose to other entities that

have been permitted to use the facilities. As to organizations with a purpose traditionally precluded from using a given facility, the property remains non-public.

The distinction between permitted and non-permitted uses is a function of the legislative interest in opening the forum in the first place. *See*, *Deeper Life*, *supra* ("'[c]ritical to a finding that [the state] has created a limited public forum,' . . . is a determination of the State's intent in establishing the forum"). In the present case, as the following analysis will demonstrate, the New York Legislature enumerated the purposes for which public school property may be used; and religious use was not among the enumerated purposes. *See*, N.Y. Educ. Law §414(1)(a)-(j).

The Court of Appeals for the Second Circuit analyzed the questions presented in the present controversy and found that:

> [a]n examination of the pertinent policy and actual practices however, convinces us that the school property in question falls within the subcategory of 'limited public forum,' the classification that allows it to remain non-public except as to specified uses.

Lambs Chapel, 959 F.2d at 386.

The Second Circuit then proceeded to examine the policy and practice of the Center Moriches School District and correctly determined that:

> . . . none of the prior uses pointed to by the [petitioners] were for religious purposes. Nor are we able to discern any previous uses of any school district property for religious purposes upon an examination of the record.
>
> ...
>
> We therefore conclude that the facilities were limited forums [sic] not opened to religious uses by policy or practice and that there was no constitutional violation in the failure of the School District to afford access to [petitioners].

Lamb's Chapel, 959 F.2d at 388.

Obviously, the distinction between eligible speakers and non-eligible speakers is an important one and petitioner's contention that "Center Moriches has not questioned Lamb's Chapel's eligibility, *as an entity*, to use school facilities," Pet. Br. at 23 (emphasis in original) is misleading. Center Moriches has repeatedly asserted that Lamb's Chapel, as a religious entity with a religious purpose, is not an eligible speaker for limited public fora purposes. *See*, *e.g.* J.A. 78, 84. They are not at all similar in purpose to any entity that has previously been granted access to the school facilities, nor is religious use consistent with New York policy regulating the use of public school property.

1. New York State And Center Moriches District Policy Supports The Conclusion That The School Facilities Are Limited Public Fora.

New York Education Law section 414 is the enabling statute that enumerates the purposes for which New York State school district property may be used. Specifically, New York public school facilities may be used, subject to the regulation and discretion of each school district's trustees or board of education, for ten (10) distinct purposes:

1 - education, learning or the arts,
2 - public library purposes,
3 - social, civic and recreational meetings and entertainment,
4 - for meetings and entertainment where admission is charged and the proceeds applied to an educational or charitable purpose, but not for the benefit of a religious sect or denomination,
5 - for polling places for primaries and elections or for political meetings and registration of voters,
6 - civic forums and community centers,
7 - for classes of instruction for mentally retarded minors,
8 - for recreation, physical training and athletics, and
9 - for child care services during non-school hours.
10- for graduation exercises held by not-for-profit elementary and secondary schools, provided that no religious service is performed.

N.Y. Education Law section 414(1)(a)-(j) (Pet. App. 53a).

Petitioners focus on subsection three and argue that it "would be difficult to imagine a more expansive use policy than one explicitly open to any 'social, civic, or recreational use.'" Pet. Br. at 19. In essence, petitioners believe that N.Y. Educ. Law section 414 encompasses the universe of constitutionally protected free speech. However, this is clearly not the case. The plain language of section 414 indicates that it was not the N.Y. Legislature's intent to permit any and all speech regardless of its message, purpose or benefit.

The Legislature obviously envisioned the benefits that individual school district communities would enjoy if school district property were open for their use; but also determined that certain classes of speech or speakers might be destructive of those ends or of the principal function and purpose of the school property, namely, the education of the State's youth. The Legislature determined that it would be inappropriate to permit religious organizations to use public school facilities for religious purposes. However, contrary to petitioner's apparent belief, this was not the only exclusion. Use of school grounds for commercial enterprises, partisan political rallies or gatherings of fraternal organizations are similarly prohibited. Petitioners appear to minimize these exclusions, but they are no less important than the religious use exclusion contained in section 414. The exclusion of certain classes of speech or speakers indicates the legislature's intent to create a "limited public forum" rather than a "generally open" designated public forum.

2. Past Practice Of The Center Moriches School District Similarly Supports The Conclusion That The School Facilities Are Limited Pubic Fora.

Petitioner argue that "[i]t has been the consistent practice of the Center Moriches School District to allow a wide diversity of outside groups to use its facilities." Pet. Br. at 19. This is true. Center Moriches, pursuant to New York State policy, has permitted many groups to use its facilities for social, civic, and recreational purposes. As to groups similar in nature to those previously granted access, Center Moriches is indeed a "designated public forum" where the applicable standard of review would be strict scrutiny.

However, School District policy does not permit school facilities to be used for religious purposes and petitioner's have apparently abandoned their argument (made to the lower courts) that certain events in the past indicated religious use. Thus, the School District facilities remain non-public with respect to religious (or partisan political or commercial organizations) entities with a religious purpose. Respondents respectfully submit that the standard by which the exclusion of petitioners should therefore be judged is that applicable to non-public fora, namely, that the limitation be reasonable and viewpoint-neutral. Such is clearly the case in the present controversy.

D. As Center Moriches School District Is A "Limited Public Forum," The Exclusion Of Lamb's Chapel, A Non-Eligible Speaker, Need Only Be Reasonable And Viewpoint-Neutral To Pass Constitutional Muster.

As a religious entity with a religious purpose seeking access to a government facility that excludes such speakers, Lamb's Chapel is not an eligible speaker for purposes of forum analysis. The Center Moriches School District facilities are limited public fora and, as such, the government regulation excluding a non-eligible speaker must be judged by the reasonable/viewpoint-neutral test. However, as stated by this Court in *Cornelius*, *supra*, the government limitation need not be the most reasonable nor the only reasonable limitation in order to pass Constitutional muster.

In the case at bar, the New York State policy as interpreted and applied by Center Moriches, precluding the use of public school facilities for religious purposes is indeed reasonable and viewpoint-neutral.

1. Reasonableness

As stated previously, the primary function of the government facility at issue here is the education of the School District's youth. Moreover, the primary purpose of the District's open access policy is to provide a setting for the District's inhabitants to pursue "social, civic and recreational" enjoyment. The New York Legislature and the School District Board of Education have determined that permitting religious (political or commercial) use may interfere with either the function of the school or

the purpose of the forum, or both. While petitioners may argue that on the specific facts of this case these possibilities are minimal, respondent's submit that this Court must look beyond the specific facts to the consequence of a court-ordered open forum. If the Court does so extrapolate, it becomes obvious that such an "open forum" policy will indeed interfere with the function and purpose of the school and the forum.

Unrestricted access would force Center Moriches to open its doors to any and all religious and political speech. It is eminently reasonable to expect problems arising when religious or political organizations gain access to public school facilities. Demonstrations against their views and beliefs may conceivably end in the destruction of school property or the disruption of classes during the week. Any of the above circumstances or a host of other very real consequences will hinder the proper and primary function of the property at issue - education.

The State's and School District's fear of such possibilities (or, more likely, probabilities) makes the restriction on religious use reasonable. Their interest in maintaining the integrity of the State's public school property is obviously of paramount importance and their determination of how best to protect that interest must be accorded the same deference given to any well-conceived and well-intentioned legislative policy. In addition, as the foregoing analysis clearly established, the regulation restricting access is not violative of any provision of the United States Constitution.

2. Viewpoint-neutral

The government restriction at issue in the case at bar does not discriminate based on the viewpoint of the excluded speaker. Rather, the regulation excludes speech on the basis of the speaker's identity and the subject matter of their speech. This Court has held that such restrictions are constitutionally permissible when applied to a private person seeking access to a non-public or limited public forum. *Cornelius*, 473 U.S. at 806 ("[c]ontrol over access to a non-public forum *can be based on subject matter and speaker identity* so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral") (emphasis added).

Petitioners take great pains to support their assertion that "[a] more flagrant policy of viewpoint - exclusion would be difficult to imagine." Pet. Br. at 30. However, petitioner's argument is undermined by the very case they cite as support - *Cornelius*. In *Cornelius*, the Court stated that:

> [a]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created, . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he expresses on an otherwise includible subject.

Cornelius, 473 U.S. at 806 (internal citations omitted).

The facts of the present case fit very neatly within the above quotation. The Center Moriches School District is a non-public forum with respect to religious use; the proselytization of religion is not an enumerated purpose of the forum and Lamb's Chapel was not excluded from the forum due to its particular viewpoint on an otherwise includible subject. Rather, exclusion was mandated by the religious purpose behind Lamb's Chapel's proposed use of the facility. This is no more viewpoint - discriminatory than excluding the Communist party from holding a political rally would be. In each case, the exclusion would be a function of the nature of the forum and the proposed use of the facility.

Certain uses were not enumerated as permissible by the New York Legislature nor are they proper for the forum at issue. To say that Center Moriches is engaged in "direct, unadulterated, censorship," Pet. Br. at 30, is to denigrate the conclusions of New York's lawmaking body and to disparage the intentions of the Center Moriches School District's Board of Education.

II. A COURT ORDERED POLICY OF UNLIMITED ACCESS WILL VIOLATE THE FIRST AMENDMENT'S PROHIBITION AGAINST GOVERNMENT ESTABLISHMENT OF RELIGION.

The First Amendment to the U.S. Constitution mandates, *inter alia*, that "Congress shall make no law respecting an establishment of religion." In interpreting this clause, this Court has identified "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)). The Court has developed a three-pronged test by which to determine when a state or federal policy violates one or all of the above "evils." *Lemon*, *supra*, 403 U.S. at 612:

> First, the statute must have a secular legislative purpose, second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster 'an excessive government entanglement with religion.'

Id. at 612-13 (internal citations omitted).

In the case at bar, the unlimited access policy that petitioner asks this Court to order would violate two of the above tests. Such a policy would have the primary effect of advancing religion and it would entangle the government unnecessarily in religious affairs. Moreover,

it is probable that such a policy would result in the appearance of government imprimatur of religion.

A. Access To Public School Facilities By Religious Organizations May Result In The Appearance Of Government Imprimatur Of Religion.

School districts in New York State may be comprised mainly of people of one particular religious faith or denomination. As such, only one religious sect may seek access to a particular school district's facilities. For example, no religious organization beside Lamb's Chapel has ever requested the use of Center Moriches school facilities for the purpose of holding services.

If the petitioners are granted the relief they seek, they may be the only religious denomination holding services in the public schools. The people of the School District and, more importantly, the children of the District will begin to identify Lamb's Chapel with the public school. This will eventually give rise to the impermissible inference that Center Moriches is sponsoring, supporting and endorsing Lamb's Chapel and their religious beliefs.

Petitioners will undoubtedly argue that they are not seeking to hold services in the school facility. However, it must be remembered that the petitioners first application to the Center Moriches school board was for the sole purpose of holding Sunday services and Sunday school (J.A. 73). Even if the request is limited to the specific circumstances of this case, it is still repugnant to the Constitution; for as this Court stated in *Lemon*:

> [a] law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the [establishment] clause. A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

Lemon, 403 U.S. at 612 (emphasis in original).

Thus, if this Court were to permit Lamb's Chapel to use the school facilities to show their film series, it would represent a first, but significant, step towards the establishment of religion.

Finally, for government to avoid the appearance of endorsing one religion over another, it would need to monitor how often the people of a particular faith used the school buildings. This constant supervision would require "excessive government entanglement with religion," in violation of this Court's interpretation of the Establishment Clause. *Lemon*, 403 U.S. at 612-13.

B. The Primary Effect Of A Court-Ordered Unlimited Access Policy Would Be Government Advancement And Financial Support Of Religion.

As it stands, the policy of the State of New York is to permit school districts to open their facilities to community use for social, civic, recreational and educational purposes. A court-ordered policy forcing school districts that have opened its doors to now permit

all speech regardless of purpose would have the primary effect of benefitting religion. Religious organizations would now be permitted to use government facilities to conduct services and hold Sunday school. *See*, Petitioner's Application, J.A. at 73. This would necessarily mean that petitioners (or other religious organizations) would benefit from state financial support in the form of rent-free facilities, heat, lighting and other connected expenses. *See*, *Trietley v. Board of Educ.*, 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dep't., 1978).

Such financial support amounts to more than just "incidental" benefits as these religious organizations would, in effect, be establishing their chapels in a public school auditorium. *See*, *Widmar*, *supra*. This is not the same type of incidental benefit a sectarian college receives when financial aid is given to assist the college in constructing or renovating its buildings and grounds. *See*, *Hunt v. McNair*, 413 U.S. 734, 742-45 (1973). Services would be held, children would attend Sunday school and the church's congregation would gather at assorted times to celebrate their faith. In addition to directly benefitting religious organizations, as stated previously, the principal effect of such a policy would be government advancement of religion. This, of course, is incompatible with the establishment clause of the First Amendment.

III. CENTER MORICHES' EXCLUSION OF RELIGIOUS SPEECH FROM PUBLIC SCHOOL FACILITIES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

Petitioner's final argument to this Court is that Center Moriches' present policy of excluding religious speech violates the Establishment Clause of the First Amendment. This argument is unpersuasive and was summarily rejected by the Second Circuit.

First, the exclusionary policy at issue here does not demonstrate hostility toward religion as petitioners suggest. Rather, it evidences the New York Legislature's and Center Moriches' desire to create a forum for social community use without the appearance of government endorsement of religion. Center Moriches has no desire to stifle or censor petitioner's right to practice and worship as they see fit. Lamb's Chapel is free to pursue their religious beliefs and hold service in any of the traditional public fora (i.e. - streets and parks) or in any facility that is available for purchase or lease. Center Moriches only asks that Lamb's Chapel not enlist the aid of the public school system to do so. *See*, *Trietley*, 65 A.D.2d at 8, 409 N.Y.S.2d at 917.

Secondly, petitioners are mistaken in their belief that the present policy will entangle government with religion. Center Moriches has never had a problem in determining when a party seeks the use of school facilities for religious purposes. In fact, the standard is a very simple one in which access is denied to any party that seeks to proselytize their religious beliefs.

Petitioner's contention that the standard vests too much discretion in the school board, exaggerates the difficulty an official would have in determining the purpose behind a particular request for access. The Center Moriches "Application for Use of School District Facilities" includes sections where applicants must enumerate the activity they seek to engage in and the purpose behind the activity. *See, e.g.* J.A. 80.

Unless the school board was to begin with the assumption that applicants are lying, there is obviously no problem in determining the purpose behind a particular request and the acceptability of that purpose.

Thus, the policy at issue is not at all hostile to religion nor does it entangle the government in religious affairs. It simply opens a public school facility for "recreational" use by the community without entangling the school district in controversy over when, how and who may use the facilities for religious or political purposes. This is altogether proper and in full accord with the dictates of the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Second Circuit.

Respectfully submitted,

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